No. 322.

Brief of Pence for D. E. (mo.

Filed Oct. 4, 1899.

Supreme Court of the United States.

Office Supreme Court U. S.
FILED
OCT 4 1899
JAMES H. McKENNEY,
Clerk

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OCTOBER TERM, A. D. 1899.

IN THE

ANTHONY F. SEEBERGER et al.,
Plaintiffs in Error,

vs.

LEANDER J. McCORMICK,
Defendant in Error.

Error to
Supreme Court
of Illinois.

MOTION TO DISMISS WRIT OF ERROR AND BRIEF FOR DEFENDANT IN ERROR.

A. M. PENCE,
GEORGE A. CARPENTER,
SHIRLEY T. HIGH,
COUNSEL FOR DEFENDANT IN ERROR.

The Stanbery-Warren Printing Company, 18 Dearborn St., Chicago.

IN THE

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ANTHONY F. SEEBERGER et al.,
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vs.

LEANDER J. McCORMICK,
Defendant in Error.

And now comes the defendant in error, Leander J. McCormick, by his counsel, A. M. Pence, and moves the court to dismiss the above entitled cause for want of jurisdiction in the Supreme Court of the United States to review the same, in that:

1. It does not appear from the record that the questions relied upon by the plaintiffs in error to give jurisdiction to this court involve any title, right, immunity or privilege under any United States statute, nor was any such question presented to or decided by the State Supreme Court.

2. It does not appear from the record that the questions relied upon by the plaintiffs in error to give jurisdiction to this court were presented to the state courts for consideration at the proper time and in the proper manner.

3. No Federal question sufficient to give jurisdiction to this court to review the decision of the state court is involved in the cause, nor was decided by the Supreme Court of Illinois.

Respectfully submitted.

A. M. PENCE.
Counsel for Defendant in Error.

And in support of this motion we make the following suggestions:

I.

No Federal question is involved as provided in Section 709 of the Revised Statutes of the United States.

Plaintiffs in error here, who were defendants in the trial court, claim an immunity or privilege under section 5,136 of the Federal Revised Statutes relating to the organization and powers of national banks.

In 1893 plaintiffs in error with others commenced the organization of the Market National Bank of Chicago, and filed with the comptroller of the currency articles of association and an organization certificate as provided in sections 5,133, 5,134 and 5,135 of the Federal Revised Statutes, and thereupon they elected these plaintiffs in error directors thereof, who elected a president and secretary, and said president and secretary, by the direction of said board and with the knowledge and consent of all these plaintiffs in error (Rec., 41-65), in the name of said Market National Bank, entered into a lease in writing with the defendant in error of certain premises for a banking office, and took possession of the same, said lease running for a term of years. At the time of the execution of

said lease said Market National Bank was not fully organized. It had not paid up its capital stock and had not obtained the certificate of the comptroller of the currency, and was not authorized to commence a banking business as provided in section 5,136 of the United States Revised Statutes.

The bank never completed its organization but went into liquidation, and thereupon abandoned its possession of said premises and refused to perform the covenants of its lease on the ground that it never had authority to make the same.

The defendant in error, after the time for which the lease was to run had expired, brought suit to recover the rent due for the term thereof, and that case was finally brought to this court, and was decided here (see *McCormick* v. *Market National Bank*, 165 U. S., 538), this court holding that, although said bank was sufficiently organized to make contracts which were incidental and necessarily preliminary to its organization, as provided in section 5,136, that the execution of the lease in question was *incidental* to a banking business, and was not *incidental and necessarily preliminary to the organization of such bank*, and as the bank organization was not completed so as to permit it to do a banking business or matters incidental thereto, that such lease was not binding upon said bank corporation.

In the course of its decision this court said (p. 551):

> "The result of the comptroller's examination and his certificate of that result and of the authority thereupon granted the corporation to commence the business of banking of course appears upon the records of his office, as do the articles of association, and the organization certificate previously transmitted to him. *Every one dealing with the corporation is bound to take notice of the facts thus appearing upon a public record*

upon which, by the very terms of the national bank act, depend the right of the association to exist as a corporation and its capacity to transact business."

This statement of the court was based upon general principles of law, and the court properly held that defendant in error was chargeable with constructive notice of the documents filed in the comptroller's office, and of the omission to file those papers necessary to constitute its authority.

The United States statutes do not provide for such constructive notice, and this court held defendant in error to have such constructive notice, not by virtue of anything stated in any Federal statute, but upon the general principles of the law applicable everywhere and in every state, whether the question arises under the organization of a Federal corporation or of a state corporation. Without the application of such a principle corporations could be organized by individuals irrespective of any statute. Such a franchise is the gift of the supreme power of the state, and does not belong to the individual as of common right (see *California* v. *Pacific R. R. Co.*, 127 U. S., 40; *Board of Trade* v. *People*, 91 Ill., 80), and can only be obtained by complying with the statute, whether state or national, and necessarily, on general principles, every one dealing with a corporation is *chargeable* with notice of the records required to be created or furnished under the statute. This is no Federal principle, and no Federal question can or does arise by reason of the decision.

At the time of the execution of this lease McCormick believed and supposed that the Market National Bank was fully organized and had the power to do a banking business, and he relied upon the representations, con-

duct and acts of its directors and officers to that effect and that they had power to bind such corporation in the making of such lease. McCormick had no *actual* knowledge or notice of the defects in such organization. (Rec., 53.)

After the decision mentioned McCormick brought suit against such directors *for breach of an implied warranty of authority* to make such lease; and recovered judgment against plaintiffs in error upon that basis. See *Seeerger* v. *McCormick*, 178 Ill., 404; which case was brought to this court by writ of error, which we now move to dismiss.

The Supreme Court of the State of Illinois in this case said (p. 415-419):

> "The principle is one of agency, and that plaintiffs in error, as the agents of the corporation in making the contract of the lease, by necessary implication asserted to the lessor that they were in fact authorized to cause the lease to be executed by the corporation. Where the contract is made in good faith and both parties are fully cognizant of the facts, and the mistake is one of law only, the result of which is to exonorate the principal from liability, because the agent had no lawful authority to make the contract, it is clear that the agent cannot be held liable, either *ex contractu* or *ex delicto*. The Appellate Court was authorized to find, and doubtless did find, that this was not such a case. These directors were charged with knowledge that they had not taken the necessary steps to obtain, and had not obtained, the certificate of the comptroller necessary to confer power to make the lease, and it was a fair inference for the Appellate Court to draw from the agreed facts that McCormick did not know of this omission until August 15, 1893, several months after the lease was executed and after possession of the premises had been taken by the lessee under it. The stipulation also showed that the plaintiffs in error canceled their

articles of association in July, but remained in possession of the premises until the 15th day of August. They had by resolution authorized and directed the execution of the lease, and there can be no doubt of *the legal sufficiency of the evidence to establish an implied warranty on their part of their authority to enter into the lease on behalf of the corporation*, if such implied warranty is in law a sufficient ground on which to make them liable to respond in damages to McCormick for a breach of such warranty.

"* * * We are of the opinion that upon both principle and authority such an action can be maintained. Indeed, the fraud, if any, arises out of the contractual relations which the parties have assumed. The express contract purporting to bind the principal may be void, but if the agent has given his warranty, express or implied, that he is authorized by his principal to execute the contract when he has no such authority, we know of no principle in law or logic which would prevent the other party from recovering for the breach of such warranty where injury has been sustained by such breach."

The court, then quoting from Mechem on Agency, says:

"Where an agent who knows he has no authority makes express assertions that he possesses it, or so acts as to amount to an assertion of authority, and by so doing deceives and injures the other party who has relied thereon, it cannot be doubted that an action on the case for the deceit is an appropriate remedy. At the same time an action of assumpsit upon the express or implied warranty of authority might also be maintained instead of the action on the case."

"As the record in this case shows a clear right of action for a breach of the implied warranty of authority against the plaintiffs in error, we deem it unnecessary to decide whether or not the findings of fact by the Appellate Court could sustain such an action on the case for deceit."

The question of law decided by the Supreme Court of the statewas not a question depending upon any Federal

statute, but upon general law, and the finding of fact upon which such question of law depends, which was decided by the Supreme Court of the state, is conclusive upon this court. *The court found that the facts in the case constituted or was evidence of an implied warranty of authority.*

This court cannot review the facts in the case, but only questions of law, and assuming the facts in the case to be as found by the state court, then the decision of the state court turned upon a general principle of law and not upon a Federal statute.

Egan v. *Hart*, 165 U. S., 188.

In the case last cited this court said:

> "The record before us contains all the testimony introduced and evidence offered in the trial court, all of which was open for consideration and passed upon by the Supreme Court of the State of Louisiana. On error, however, to a state court, this court cannot re-examine the evidence, and when the facts are found below is concluded by such finding."

It follows, therefore, in the case at bar, that this court cannot review the evidence upon which the Supreme Court of Illinois found that there was an implied warranty of of authority on the part of the plaintiffs in error.

That court said:

> "They (the directors) had by resolution authorized and directed the execution of the lease, and there can be no doubt of the legal sufficiency of the evidence to establish an implied warranty on their part of their authority to enter into the lease on behalf of the corporation."

This finding was a finding of fact which this court cannot review even though it were of the opinion that the evidence was not sufficient to establish such an implied

warranty on the part of these plaintiffs in error, and the Supreme Court of the state found that such implied warranty was in law a sufficient ground on which to make them liable to respond in damages to McCormick for a breach of such warranty. Hence, the whole question is reduced to a question of fact or of controverted evidence and the drawing of a conclusion of fact from the evidence offered, upon which the Supreme Court of the state based its decision, can not be said to be a question of law, and such conclusion of fact cannot. therefore, be reviewed by this court.

Plaintiffs in error do not claim that they made this lease under the power conferred upon them by the National Bank Act, but allege that they had no such power, and this court decided that they had no such power. They claim, therefore, no right or immunity under this act. They are estopped by the judgment in the case of *McCormick* v. *The Market National Bank* from claiming that they had power under this act to make this lease because they asserted in that case that they had no such power. If they were disposed to set up in this case that they had such power they would be estopped from doing so, but they were not foolish enough to set up in defense of this action against them that they were empowered by the National Bank Act to make this lease. They never set up any such right, claim or immunity.

The record shows that they never have made such claim; hence there can be no Federal question involved in this case, for this court cannot review a claim made for the first time in this court that there is a Federal question when it was not made in the state court as a part of their defense.

Upon examination of the assignment of errors in this court (Rec., 129), it will be seen that they have raised no such question in this court. They do not claim any protection or refer to any power conferred under the statute, but deny their authority to execute this lease by virtue of the statute. How can it be claimed, therefore, that they set up a privilege or immunity under the statute of the United States?

II.

If it were conceded to be a Federal question as between the Market National Bank and McCormick by reason of such constructive notice to McCormick of the want of power on behalf of the bank to make the contract in question, it would not, however, be a Federal question as between plaintiffs in error—the agents of the same corporation—and McCormick. The individual liabilities of such agents of a corporation, growing out of their acts or conduct, or out of their frauds, do not depend upon any Federal statute but upon the principles of the common law.

> "The effect of constructive notice in cases where it is applicable, as in contests between *equities of innocent parties*, is sufficiently severe, and is only resorted to from the necessity of finding some ground between equities otherwise equal."

This language is used by Lord Chancellor *Cottenham* in the case of *Wo!d* v. *Gibson*, 1 House of Lords Cases, p. 622.

Plaintiffs in error were not *innocent parties*, inasmuch as they made false representations of their authority.

In the case brought to this court between *McCormick* and the *Market National Bank* there were two innocent

parties, one or the other of which must suffer by the action of the agents of such corporation, and in such case the court was entirely justified in finding that the bank would be protected, and that McCormick was chargeable with notice of the facts for the purposes of that case. Constructive notice, however, is not binding in a suit brought against the officers of a bank based upon their acts, conduct or false representations.

Weidler v. *Farmers Bank of Lancaster*, 11 S. & R., 134.
Lasher v. *Stimson*, 145 Pa. St., 30.
Clark v. *Edgar*, 84 Mo., 106.
Bigelow v. *Gregory*, 73 Ill., 197.
Cherry v. *The Colonial Bank*, L. R., 3 Privy Council App., 24.
Medill v. *Collier*, 16 Ohio St., 599.
Lagrone v. *Timmerman*, 46 S. Car., 372.
Merchants National Bank v. *Robinson*, 8 Utah, 256.
Nash v. *Minnesota Title Co.*, 159 Mass., 437.
Taylor v. *Nostrand*, 134 N. Y., 108.
Miller v. *Reynolds*, 92 Hun, 400.
Bank v. *Byers*, 139 Mo., 627.
Corwith v. *Culver*, 69 Ill., 503.
McCarthy v. *Lavasche*, 89 Ill., 270.
Casey v. *Galli*, 94 U. S., 673.
Bigelow on Estoppel (5th edit.), 462.
Hermann on Estoppel, Sec. 1250.

In *Weidler* v. *Farmers Bank of Lancaster*, *supra*, Chief Jnstice GIBSON said:

"*Constructive* notice is not *prima facie* evidence of actual knowleedge of the facts, and, therefore, con-

> structive notice is always insufficient to fix on a party actual knowledge."

It is stipulated that McCormick had no actual knowledge of the defect in the organization of this corporation (Rec., 53), and it was also found by the Supreme Court of the state that the plaintiffs in error here had knowledge that they had not taken the necessary steps to obtain, and had not obtained, the certificate of the comptroller necessary to confer power to make the lease.

In *Lasher* v. *Stimson*, 145 Pa. St., 30, a corporation was organized in New Jersey and attempted to do business in Pennsylvania without obtaining a license from the secretary of the state of Pennsylvania as required by the laws of that state. When the agent was sued upon the contract made by him in the name of the corporation, he set up as a defense that the person dealing with him was chargeable with notice that such license had not been issued, and consequently that he had knowledge of all the facts the same as the agent, but the Supreme Court of Pennsylvania said:

> "A citizen of this state who had a business transaction with another as the agent of a foreign corporation *may rely upon the representations of the agent* as to his authority without releasing him from his common law liability as principal if it turns out that his action was unauthorized. In other words, his failure to make search in the office of the secretary of the commonwealth for the statement which the corporation had to file there *will not inure to the benefit of the person who falsely pretended that he was its duly constituted agent.*"

In the case of *Clark* v. *Edgar*, 84 Mo., 106, a false representation was made by the officers of the corporation as to the charactor of a security as to whether it was a first or second mortgage, and the court there held that reliance

might be placed on the representations of the directors or officers, and that no constructive notice by the record was chargeable as would defeat a recovery against the directors.

In *Cherry* v. *The Colonial Bank*, *supra*, the law or charter provided that the officers of a certain corporation might borrow money *if authorized by a majority of the shareholders, but not otherwise.* Two of the directors in the name of the corporation borrowed money of the bank without the consent of a majority of the stockholders, and the money not being paid the bank sued the directors individually, and the court held them liable, and in doing so necessarily had to decide that the persons loaning the money to the corporation were not chargeable with notice of the want of of authority in its directors. The person or bank loaning the money could not sue the corporation because of such want of authority from the shareholders, but were chargeable with constructive notice of such want of authority so far as the corporation was concerned, but not so, as to the individual members or officers of the corporation.

In *Medill* v. *Collier*, *supra*, the officers of a bank partially organized, as in this case, and which had certain powers by virtue of such partial organization, as in the case at bar, were sued individually, and the Supreme Court of Ohio held them liable for the very reason that the bank was not liable, as the person dealing with it had *constructive notice* of such defects in its organization. The facts in that case are like those in the case at bar in all particulars. Such constructive notice when the bank is sued cannot be carried over and treated as actual notice when the officers are sued, for constructive notice necessarily implied the want of actual notice or knowledge, and if the person dealing with such officers does not have actual notice of the

fact, while the officers do have notice of it, the latter cannot claim the benefit of such constructive notice when sued individually.

In *Bigelow* v. *Gregory*, 73 Ill., 197, the court must necessarily have held and the case could not be decided without the court holding that the person dealing with the directors had a right to rely upon their representations, and that the person so dealing was not chargeable with notice of the dejects in the organization of the corporation.

In the case of *Lagrone* v. *Timmerman, supra*, the court said (p. 407):

> "This action was brought against the defendant individually, and was based upon the theory that defendants held themselves out as agents of the Farmers' Mutual Fire Insurance Association for the County of Edgefield, when in fact they had no such authority and therefore the defendants pretending to act as agents of a corporation having no legal existence as such, and no power to enter into the contract evidenced by the policy, became personally liable for the performance of such contract."

In *Merchants' Bank* v. *Robinson, supra*, a *national* bank in the course of its organization and before it was fully organized, issued certificates of stock which were sold to an innocent party. The court, in deciding the caset said:

> "A person who signs a certificate of stock of a bank represents to all the world that he is the officer he represents himself to be; *that he is authorized to issue such certificate;* that the person to whom it is issued has the interest in the bank the certificate purports to give; *that the bank is an existing institution;* that the shares of stock the certificates mention are fully paid for; that the certificate is in all things what it purports to be. *If any of these are known to be false he who signs the certificate is liable to any one who may be*

> *injured thereby.* These views are so fundamental and so consonant with honesty and fair dealing that they need no authority in their support."

In the case of *Bank* v. *Byers*, 139 Mo., 627, there was a first mortgage on record, and the officers of the bank executed a second mortgage securing certain bonds, reciting on the face of such second mortgage bonds that it was a first mortgage. The land was sold under the first mortgage for the amount due thereon, and the owners of the second mortgage bonds sued the officers upon their false representations, and the court in deciding the case said (p. 657):

> "The statement on the face of the bonds was a part thereof, and intended by defendants to be acted upon as true by all persons who purchased them, whether directly or indirectly, and any person who purchased them in good faith before maturity, relying upon the statement that they were first mortgage bonds, and who may have been injured thereby, may hold the defendants responsible for the actual damages sustained."

In the case of *Corwith* v. *Culver*, 69 Ill., 513, a party acted as president of a private corporation and held it out to the world as legally organized, which, it seems, was not the case. A creditor of the corporation brought suit against him as a stockholder under the statute, he being a subscriber to the stock of such corporation. The creditor in that case as much as here had constructive notice of the defective organization of the corporation, nevertheless the Supreme Court of Illinois held him responsible, and in the course of its opinion said:

> "It would rather appear from the evidence that the whole amount of the capital stock of the company had not been subscribed for; and it is contended that until that had been done the company could not exercise the functions of a corporation nor enter into

contracts on which an individual subscriber could be made liable. *But after the co-operation of the defendant to the extent shown, in carrying out the operations of the company, he must be held estopped from setting up such a defense.*"

There can be no distinction drawn between the liability of such an agent, whether sued upon his statutory liability or upon his common law liability based upon his false representations.

In the case of *McCarthy* v. *Lavasche*, 89 Ill., 270, it was held that the corporation was not legally organized, and that its charter was unconstitutional. The defendant was sued upon a statutory liability the same as if the corporation had been legally organized under a constitutional law and set up as a defense that the corporation was illegal and had no authority to borrow the money, and the court held the defendant responsible.

In the course of the decision the court said:

"May those who promoted the enterprise by becoming shareholders to enable the company to organize and to procure other people's money be heard to interpose such a defense? * * * Fair dealing would say that they should be estopped from interposing such a defense. * * *."

And the court also held in that case that without reference to the statutory liability that such shareholder was liable for his false representations made as to the authority of the corporation upon general principles of common law.

The court said (p. 275):

"If stockholders might show the law unconstitutional and their organization void, and all their acts unauthorized, *then all persons engaged in the organization of the corporation* should be held liable for the consequences of their illegal and unauthor-

ized acts independently of the clause in their charter. *So they should in no event escape liability for obtaining money without authority.*"

So it is clear in the State of Illinois that its Supreme Court has always laid it down as a principle of general law, that agents acting as in the case at bar were responsible upon their *implied warranty of authority*, and that a creditor or person dealing with such agents, although chargeable with notice that the corporation was illegally formed and not liable, nevertheless, that the agent of such corporation was liable upon such implied warranty of authority. This is the well established law in Illinois. In the decision of the case at bar, there being no reference to any Federal statute, or any Federal question, but the decision being made upon the plain principles of the common law, the parties cannot now import into this case a Federal question while the Supreme Court of the State was not aware that it was deciding a Federal question, and, in point of fact, no Federal question was ever raised or discussed, and no statute of the United States was ever referred to.

Mr. Bigelow, in his work on Estoppel (fifth edition), page 462, says:

> "It should be added that a third person, as *e. g.*, one assuming to act for a supposed corporation, will be estopped probably in any case to deny the truth of the representation, expressed or implied, in holding out the corporate existence of a body to an innocent person who has been induced thereby to deal upon that footing."

And Mr. Hermann, in his work on Estoppel, section 1250, lays down the same principle.

In *Casey* v. *Galli*, 94 U. S., 673, a stockholder was sued to enforce his individual liability upon the failure of a

national bank, and he set up as a defense that there was no such corporation, and that it was wholly illegal and had no power to do a banking business. The court disposed of the plea and held that such stockholder was bound by his acts and conduct.

The court said:

> "To hold otherwise would be contrary to the plainest principles of reason and of good faith, and involve a mockery of justice. Parties must take the consequences of the position they assume. They are estopped to deny the reality of the state of things which they have made appear to exist and upon which others have been led to rely. Sound ethics require that the apparent, in its effect and consequences, should be as it were real, and the law properly so regards it."

The plaintiffs in error in this case, who were directors of this bank so partially organized, knew that the capital subscribed had not been collected; they knew that the bonds required to secure their bank circulation had not been deposited; they knew that the comptroller had not issued his authority for them to commence a banking business; they knew those things, as it was their duty to perform those acts and to receive the comptroller's consent.

They stipulated that McCormick did not know these facts; they stipulated that he understood and believed that the bank was fully organized to do a banking business, and they stipulated that McCormick had no knowledge or information to the contrary (Rec., 53); they stipulated that the board of directors authorized and assented to this lease (Rec., 41); they stipulated that all such directors had full knowledge of and consented to the execution of the said lease. (Rec., 65.)

Their execution of the lease was a representation on their part that the bank was fully organized and authorized to sign the lease. There was a misrepresentation and even a fraud on the part of these directors, and consequently they cannot escape liability.

If a person represents to me that he is the agent of the owners of a certain tract of land and makes the contract with me for its sale, and it afterwards turns out that his supposed principal had never granted him authority to make such sale or did not own the property, then, if I should sue the agent upon his implied warranty of authority such agent cannot escape his liability by referring me to the records in the recorder's office where I might have ascertained who the owner was, and also have ascertained from the supposed principal that the agent had no such authority.

I would not be compelled under such circumstances to go to the supposed principal and inquire for the agent's authority. Of course, I could not hold the principal if I neglected to inquire as to such authority, but I could hold the agent responsible for the damages suffered by me. I had a right to rely upon his representations of authority.

It is clear, therefore, in this case, that, although the defendant in error might be *chargeable* with constructive notice of the want of authority of said corporation, yet such constructive notice would not relieve the agent from the effect of the representations made by him as to such authority.

Consequently it cannot be said that there is under any circumstances a Federal question involved inasmuch as the principle laid down by this court that McCormick was chargeable with constructive notice as to the defects in the

organization of the bank was the announcement of a general principle of law, and was not based upon any Federal statute, and it being admitted that Mr. McCormick in his suit against the bank was chargeable with notice it was not such notice as would follow him in his suit against the plaintiffs in error, the directors of such bank. The principle was only applicable in the first case on account of the equal equities between McCormick and the bank, but there being no equities in favor of the plaintiffs in error, on account of their false representations, he is not chargeable with such notice, and he is not chargeable upon general principles of law, or because of any Federal statute; and this court, when it held that McCormick was chargeable, as between him and the corporation, with notice of such facts as the records of the comptroller disclosed on examination, did not base its decision upon any statute, but announced a principle common to all jurisdictions. *As well contend that every principle of law announced by this court in every case is the decision of a Federal question.* The liability or want of liability of such agents does not depend upon any Federal statute. They do not claim that they made this lease under the power conferred upon them by the National Bank Act, but allege that they had no such power, and this court decided they had no such power. They claim no right of immunity under this act.

III.

Any title, right, privilege or immunity claimed under a Federal statute which the parties seek to have reviewed by this court must be "specially set up or claimed" at the proper time and in the proper way.

It must appear that the claim was made in the trial court because the Supreme Court of the state was only author-

ized to review the judgment for errors committed in the trial court, and the Supreme Court of the United States can do no more. If the right was not set up or claimed in the trial court then the judgment of the highest court of the state in the action is conclusive so far as the right of review in this court is concerned. The question whether the evidence introduced would be competent evidence cannot be reviewed unless its competency was objected to in the trial court upon the ground that it was in violation of some Federal right.

Spies v. *Illinois*, 123 U. S., 181.
Brooks v. *Missouri*, 124 U. S., 394.
Kipley v. *Illinois*, 170 U. S., 186.
Oxley Stave Co. v. *Butler County*, 166 U. S., 653.
L. N. Ry. Co. v. *Louisville*, 166 U. S., 714.
The Victory, 6 Wall., 382.
Edwards v. *Elliott*, 21 Wall., 532.
New York Life Ins. Co. v. *Hendren*, 92 U. S., 286.
Sayward v. *Denny*, 158 U. S., 180.
Winona-St. Peter L. Co. v. *Minnesota*, 159 U. S., 540.
Ansbro v. *United States*, 159 U. S., 695.
Chicago & North-Western Ry. Co. v. *Chicago*, 164 U. S., 454.
Chemical Bank v. *City Bank of Portage*, 160 U. S., 646.

Was any title, right, privilege or immunity specially set up or claimed at the proper time and in the proper way to be reviewed by this court?

No claim was made in the trial court that a Federal question of any kind was involved nor was any made in the Appellate or Supreme Courts of the state.

No question as to the admissibility of any evidence was raised on the ground of any title, right, privilege or immunity being claimed under any United States statute.

The declaration (Rec., 7) raises no question claimed by virtue of any Federal statute or against such statute. The pleas commence on record, page 27, and consist, *first*, of the general issue, and, *second*, that defendants were not jointly liable. No defense was interposed under any Federal statute. The case was submitted to the court to be tried without a jury upon stipulated facts. (Rec., 35.) No question was raised in such stipulation as to the competency of any of the facts therein stipulated nor was any question raised upon the hearing as to the admissibility in evidence of the representations, acts, and conduct of plaintiffs in error touching the execution of the lease in question, but all such representations, acts and conduct were admitted in evidence without objection.

Nothing whatever appears in the record anywhere raising or purporting to raise any Federal question or as to the right, title, privilege or immunity arising to the defendants under section 5,136 of the national banking act, or of any other section of that act. The record is absolutely silent as to the intention of the defendants to raise any Federal question in any possible way.

Under the Practice Act of Illinois, where trial is by the court, either party may "submit to the court written propositions to be held as law in the decision of the case upon which the court shall write 'refused' or 'held' as he should be of opinion is the law, or modify the same, to which either party may except as to other opinions of the court." Revised Statutes of Illinois, Chap. 110, Sec. 42, 3 Starr & Curtiss', 3033. No question of law can be raised or re-

viewed in the Supreme Ccourt of the state unless such proposition is submitted and passed upon in the trial court.

Myers v. *Union National Bank*, 128 Ill., 478.

Fitch v. *Johnson*, 104 Ill., 119.

The defendants, plaintiffs in error here, *did not ask the court to hold any propositions of law* or to determine the effect of any Federal statute. The defendant in error here, plaintiff below, requested the court to hold ten propositions of law, all of which were denied by the court and exception taken to the rulings by the defendant in error. Plaintiffs in error offered no propositions to be held as law by the trial court. (Rec., 69-76.) Judgment was entered in favor of defendant and against the plaintiff for costs. (Rec., 33.)

No exception was taken; no objection was made to any evidence upon any ground, and none was specifically made on the ground of any Federal questions being involved. The case was appealed to the Appellate Court, where the Appellate Court reversed the trial court and entered judgment in accordance with the powers conferred by the statute; no Federal question was raised or decided in the Appellate Court. Plaintiffs in error here sued out a writ of error from the Supreme Court of Illinois to the Appellate Court of Illinois.

Defendant in error here, who was appellant in the Appellate Court, assigned errors in the Appellate Court (Rec., 80), but nowhere referred to any error committed or to any ruling touching any Federal question. Plaintiffs in error here raised no question in the Appellate Court touching any Federal question.

In the Supreme Court of the state plaintiffs in error assigned errors (Rec., 91), in neither of which is there any reference to any error committed by the Appellate Court touching its decision of any Federal question.

The errors assigned by plaintiffs in error in the Supreme Court are as follows:

1. "The Appellate Court erred in not affirming the judgment of the Superior Court of Cook County.
2. "The Appellate Court erred in reversing the judgment of the Superior Court of Cook County.
3. "The Appellate Court erred in entering judgment against plaintiffs in error and in favor of defendant in error, in manner and form as the same was entered.
4. "The damages awarded by the Appellate Court to the defendant in error are excessive."

These were the only errors assigned by plaintiffs in error in the Supreme Court of the state, and it appears nowhere in the decision of the Supreme Court that any Federal question was presented to it for decision or "spe-"cially set up or claimed,"and it does not appear from its opinion that it decided or intended to decide any Federal question, but its whole decision was based upon principles of general law.

Plaintiffs in error here claim that a Federal question was raised by the proposition of law which was presented by the defendant in error here to the trial court (Rec., 72), being No. 7 of the series, which proposition, however, the trial court refused to hold as law.

It is as follows:

"The court holds that so far as the obligations of these defendants are concerned the plaintiff was not bound to examine the records of the office of the comptroller of the currency to ascertain the facts touching the organization of the Market National Bank,

> and that he was not chargeable with notice of the facts contained in or omitted from such record touching such organization so far as defendants' obligations are concerned; and he had the right to rely upon the representations, acts and conduct of the directors and officers of such corporation respecting its legal organization and its right to commence a banking business and its right to execute the lease in question, and a representation need not be expressed, but may be implied either from acts, silence or conduct."

Proposition 9 is also similar.

Plaintiffs in error here contend that although the propositions of law so tendered to the trial court were not held to be the law in the decision of the case by the trial court, yet that in some way those propositions have been held to be the law both by the Appellate and the Supreme Courts of the state. It is in and by these propositions alone that plaintiffs in error here contend that a Federal question was raised and submitted for decision. They point out no other portion of the record by which they claim any Federal question was raised. Whether the Supreme Court intended to hold that propositions 7 and 9 so tendered to the trial court were good law does not appear. It decided the case upon general principles.

But one thing is certain, that whether the Supreme Court intended to hold propositions 7 and 9 as good law or not, they did not hold anything touching any Federal question, and that nothing was said in those proposed propositions as to any Federal question arising under any federal statute.

The Supreme Court of the state has said nothing as to whether the plaintiff in this case (the defendant in error here) was charged with notice by the records in the comptroller's office. It has said nothing about constructive

notice; it has said nothing about any statute in which provision is made that such record of the comptroller's office should be notice. It has not decided that question. It did not deem it necessary to decide that question. It was nowhere presented to that court for decision. It was not raised by any assignment of error in that court, consequently it cannot be now raised.

The facts admitted in evidence by stipulation, and referred to in propositions 7 and 9 so tendered to the court, were not objected to in the trial court upon any ground, much less upon the ground that they were contrary to any Federal statute, and consequently plaintiffs in error cannot now have the question reviewed as to the admissibility of such evidence or as to its legal effect, as they did not upon the trial choose to raise the question.

In *Spies* v. *Illinois*, 123 U. S., 181, a certain letter seized in the possession of Spies was offered in evidence against him—and the Constitution of the United States probably protected him from any such use of his private papers which were so seized—but the objection that the letter was obtained from the defendant by unlawful seizure was made for the first time in the Supreme Court of the state. It was not made on the trial in the court below. This court, upon the review of the judgment of the Supreme Court of Illinois touching this question, said:

> "To give us jurisdiction under section 709 of the Revised Statutes because of the denial by a state court of any title, right, privilege or immunity claimed under the constitution, or any treaty or statute of the United States, it must appear on the record that such title, right, privilege or immunity was *'specially set up or claimed'* at the proper time in the proper way. To be reviewable here the decision must be against the right so set up or claimed. As the Supreme Court of the state was reviewing the decision of the trial court,

> it must appear that the claim was made in that court, because the Supreme Court was only authorized to review the judgment for errors committed there, *and we can do no more.* * * * If the right was not set up or claimed in the proper court below, the judgment of the highest court of the state in the action is conclusive, so far as the right of review here is concerned. The question whether the letter, if obtained in the manner alleged, would have been competent evidence, is not before us, and, therefore, no foundation is laid under this objection for the exercise of our jurisdiction."

In the case at bar, no right, privilege or immunity was set up or claimed in the trial court or in the Supreme Court of the state, or anywhere else, growing out of any Federal statute, and hence under this decision none can now be raised.

In *Brooks* v. *Missouri, supra*, the Spies case was referred to and quoted from as part of the opinion in that case, and after quoting as above, this court said (p. 395):

> "Applying that rule (in the Spies case) to this case, we find that at the trial no title, right, privilege or immunity was specially set up or claimed under the constitution, laws or treaties of the United States. Thus, when the testimony of McCullough was offered, the admission of which is now assigned for error, the objection made was not that its admission would be a violation of any provision of the Constitution or laws of the United States, *but because it was 'incompetent and irrelevant.'* * * *
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> "And so in respect to the ruling on the motion to quash the indictment, and to discharge the defendant from arrest, the only objection was 'that said indictment, proceedings, imprisonment, and restraint are illegal and unlawful, and in violation of the Constitution and laws of the State of Missouri, and without any due process of law or lawful authority whatsoever.' The particular provisions of the Constitution of the state now relied upon in support of this assign-

ment or error are section 11 of the bill of rights, to the effect that 'no warrant to seize any person shall issue without probable cause, supported by oath or affirmation reduced to writing,' and section 12, 'that no person shall, for a felony, be proceeded against criminally, otherwise than by indictment.' "

Then, after reciting several other assignments of error, this court says;

"These are all the assignments of error which relate to the rulings in the progress of the trial, and they fail entirely to present any questions of Federal law for our consideration. So far as appears, the trial court in its decisions was governed exclusively by the Constitution and laws of the state, and the Supreme Court in its opinion on this part of the case, which is in the record, *makes no mention whatever of any claim of right under the Contsitution or laws of the United States.*"

The same can be said in this case, that neither in the trial nor the Appellate nor the Supreme Court of the state does it appear that any claim whatever of rights under the Constitution or laws of the United States was made.

In *Oxley Stave Co.* v. *Butler County*, 166 U. S., 648, which was a civil suit, the case was brought up by a writ of error to the state Supreme Court under section 709 of the Revised Statutes, and this court said:

"But it cannot review such final judgment, *even if it deny some title, right, privilege or immunity of the unsuccessful party*, unless it appear from the record that such title, right, privilege or immunity was *'specially set up or claimed'* in the state court as beloging to such party, under the Constitution or some treaty, statute, commission or authority of the United States.

"*Looking into the record we do not find that any reference was made in the court of original jurisdiction to the Constitution of the United States.* Nor can it be inferred from the opinion of the Supreme Court of

Missiouri that that court was informed by the contention of the parties that any Federal right, privilege or immunity was intended to be asserted. *For aught that appears the state court proceeded in its determination of the cause without any thought that it was expected to decide a Federal question.*"

The court further said:

"Do such general allegations meet the statutory requirement that the final judgment of a state court may be re-examined here if it denies some title, right privilege or immunity 'specially set up or claimed' under the Constitution or authority of the United States? We think not. The specific contention now is that the decree of the Butler County Circuit Court in the suit instituted by the County of Butler was not consistent with the due process of law required by the fourteenth amendment of the Constitution of the United States. But can it be said that the plaintiffs *specially* set up or claimed protection of that amendment against the operation of that decree by simply averring—*without referring to the Constitution or even adopting its phraseology*—that the decree was passed against deceased persons as well as in the absence of necessary or indispensable parties?

"This question must receive a negative answer, if due effect be given to the words 'specially set up or claimed' in section 709 of the Revised Statutes. * * * The words 'specially set up or claimed' imply that if a party intends to invoke for the protection of his rights the Constitution of the United States or some treaty, *statute*, commission or authority of the United States, *he must so declare;* and unless he does so declare *'specially'—that is, unmistakably—this court is without authority to re-examine the final judgment of the state court.* This statutory requirement is not met if such declaration is so general in its character that the purpose of the party to assert a Federal right is left to mere inference. It is the settled doctrine of this court that the jurisdiction of the Circuit Court of the United States must appear affirmatively from the record, and that it is not sufficient that it may be in-

ferred argumentatively from the facts stated. Hence the averment that a party resides in a particular state does not import that he is a citizen of that state. (Citing cases.) Upon like grounds the jurisdiction of this court to re-examine the final judgment of a state court cannot arise from mere inference, *but only from averments so distinct and positive as to place it beyond question that the party bringing a case here from such court intended to assert a Federal right.*

After reviewing the authorities, the court states:

"Without further reference to the adjudged cases, we are of opinion that the general allegation or claim, in different forms, that the decree of the Butler County Circuit Court was passed against some persons who were dead, and against others who were necessary parties, but who had no notice of the proceedings, does not, within the meaning of section 709 of the Revised Statutes, specially set up a right or immunity under the Fourteenth Amendment of the Constitution of the United States, forbidding a state to deprive any person of his property without due process of law. If it appeared that the Supreme Court of the state regarded these general allegations as asserting such Federal right or immunity, and denied the claim so asserted, our jurisdiction could be sustained. But it does not so appear."

In *Sayward* v. *Denny*, 158 U. S., 180, the chief justice again reviewed this proposition, and concluded thus:

"We are not called upon to revise these views *of the principles of general law* considered applicable to the case in hand. It is enough that there is nothing in the record to indicate that the *state courts were led to suppose that plaintiff in error claimed protection under the Constitution of the United States from the several rulings*, or to suspect that each ruling as made involved a decision against a right specially set up under that instrument, and we may add *that the decisions of state tribunals in respect of matters of general law cannot be reviewed on the* theory that the law of the land is violated unless their conclusions are absolutely free from error."

In *Ansbro* v. *United States*, 159 U. S., 695, this court said:

> "But we cannot find that any constitutional question was raised in the trial. Motions to quash, to instruct the jury to find for the defendant, for new trial, and in arrest of judgment were made, but in neither of them, so far as appears, nor *by any exception to rulings on the admission or exclusion of evidence*, nor to instruction given or the refusal of instructions asked, was any suggestion made that defendant was being denied any constitutional right or that the law under which he was indicted was unconstitutional. The first time that anything appears on that subject is in the assignment of errors, filed February 13, 1895.
>
> "A case may be said to involve the construction or application of the Constitution of the United States when a title, right, privilege or immunity is claimed under that instrument, but a definite issue in respect of the possession of the right must be distinctly deducible from the record before the judgment of the court below can be revised on the ground of error in the disposal of such a claim by its decision. And it is only when the constitutionality of a law of the United States is drawn in question, not incidentally but necessarily and directly, that our jurisdiction can be invoked for that reason. (Citing cases.) An assignment of errors cannot be availed of to import questions into a cause which the record does not show were raised in the court below and rulings asked thereon, so as to give jurisdiction to this court under the fifth section of the act of March 3, 1891."

In *Kipley* v. *Illinois*, 170 U. S., 182, it was sought to review the decision of the Supreme Court of the state by claiming some title. right, privilege or immunity under the constitution and laws of the United States. It was an original proceeding in the state court by way of mandamus. This court in its opinion points out the defects. The court says:

"We are of opinion that this court is without jurisdiction to review the final judgment of the Supreme Court of Illinois in these cases. The answer makes no reference whatever to the Constitution or laws of the United States. It is true that it avers that the Illinois Civil Service Act was *'unconstitutional and void.'* But when the jurisdiction of this court is invoked for the protection, against the final judgment of the highest court of a state, of some title, right, privilege or immunity secured by the Constitution, or laws of the United States, it must appear expressly or by necessary intendment, from the record, that such right, title, privilege or immunity was 'specially set up or claimed' under such constitution or laws. (Rev. Stat., 709.) Our jurisdiction connot arise in such case from inference, but only from averments so distinct and positive as to place it beyond question that the party bringing the case up intended to assert a Federal right. * * * It is manifest that when the answer was drawn, neither the defendant Kipley nor the learned counsel representing him intended to raise any question of a Federal nature. We cannot suppose that it occurred to either of them at that time that the Civil Service Act of Illinois was repugnant to the Constitution of the United States.

"* * * It may be observed that the opinion of the state court delivered upon final hearing contains nothing to show that any Federal question was considered or determined."

We wish only to add that a similar question was attempted to be raised here by the same attorney, who is counsel in this case, in *Chemical Bank* v. *City Bank of Portage*, 160 U. S., 646, and this court refused jurisdiction.

In that case the cause was tried without a jury and propositions of law were submitted. This court said:

"The Appellate Court reviewed the judgment of the Superior Court for errors committed on the trial,

and, finding none, affirmed it, and the Supreme Court affirmed the judgment of the Appellate Court; and if no such claims were set up in the trial court the Supreme Court in approving the affirmance of its judgment by the Appellate Court could not be held to have decided against a claim with which the trial court had not been called upon to deal. It does not appear that the immunity from liability was expressly claimed by plaintiff in error in the trial court on the ground that the bank could retain the money, because it was obtained by means in excess of the powers of its cashier or other officers.

"The propositions on which the trial court was asked to rule were manifestly directed to the right of recovery on the note as such, under the special count, and certainly fell far short of a claim of the character suggested as a defense to a recovery under the common counts. *Moreover, the question of liability, whatever the authority of these bank officers to borrow this money for the bank, depended upon general principles of law applicable under the particular facts.*"

We need quote from no further cases upon this proposition. It is plain in this case that no Federal question was ever specially set up or claimed in the courts below by the plaintiffs in error; nor was any Federal question decided or considered by the Supreme Court of the state.

IV.

The Merits of the Case.

If this court should decide that it has jurisdiction then it must also determine whether the supposed Federal question was properly decided by the Supreme Court of Illinois.

If properly decided then no other question will be determined, and this court will affirm such judgment, though it should be of the opinion that other legal questions in the case were improperly decided.

If the court should be of the opinion that such supposed Federal question was improperly decided by the state court, yet, if there be other matters upon which the judgment can be sustained, notwithstanding such error in the decision of the Federal question, the judgment will be affirmed.

Murdock v. *City of Memphis*, 20 Wall., 590.
Missouri Pacific Ry. Co. v. *Fitzgerald*, 160 U. S., 576.

The question in the case claimed to be Federal in its character was properly decided. No argument can make it any more clear than the bare reading of the opinion of the Supreme Court of Illinois.

The authorities under point II of this brief may be examined upon this proposition if the court has any doubt.

Aside from the supposed Federal question there is sufficient in the record to show that the judgment can be sustained without a reference to such Federal question.

The court will not look at the evidence or re-examine same. The facts being found by the Supreme Court of the state, this court is concluded thereby.

Egan v. *Hart*, 165 U. S., 188.

The Supreme Court of the state said (*Seeberger* v. *McCormick*, 178 Ill., 416):

> *"And there can be no doubt of the legal sufficiency of the evidence to establish an implied warranty of authority to enter into the lease on behalf of the corporation."*

This court cannot re-examine the evidence or any portion thereof for the purpose of ascertaining whether the state Supreme Court erred in such finding of facts. It can only re-examine the questions of law applicable to such a state-

ment of facts. The right to recover upon such contract and upon such a statement of facts is a question of general law which this court cannot review as it does not involve a Federal question, and is also sufficient to sustain the judgment aside from any supposed Federal question.

This court, in *Egan* v. *Hart, supra*, said:

> "The record before us contains all the testimony introduced and evidence offered in the trial court, all of which was open for consideration and passed upon by the Supreme Court of the State of Louisiana. On error, however, to a state court this court cannot reexamine the evidence, and when the facts are found below is concluded by such finding."

If this court has jurisdiction to entertain this writ of error it should then affirm the judgment with ten per cent. damages under the rule of this court.

Respectfully submitted.

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